United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4049
75-4055

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IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and
CAPTAIN EUGENE L. COCHRAN,

Petitioners,

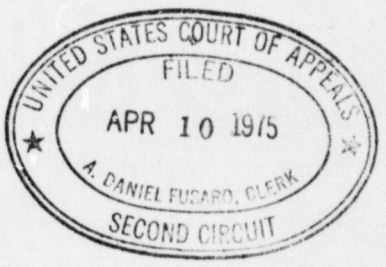
v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Consolidated Petitions to Review an Order of the
Civil Aeronautics Board

BRIEF FOR PETITIONERS



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MISCELLANEOUS

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STATEMENT OF THE ISSUE

The issue presented is whether, contrary to the ruling of the Civil Aeronautics Board herein, certificated air carriers and their employees retain the right expressly guaranteed by the Federal Aviation Act of 1958, as amended, to surpass the minimum safety standards set by the Department of Transportation/Federal Aviation Administration for transporting hazardous cargo and to reject cargo which the airlines and their employees believe may be inimical to safety of flight.

STATEMENT OF THE CASE

This case is before the Court upon the consolidated petitions of Air Line Pilots Association, International ("ALPA") and Captain Eugene L. Cochran to review and set aside a final order of the Civil Aeronautics Board ("the Board" or "the CAB"), Order 75-2-127, which was issued on March 3, 1975. The petitions for review were filed pursuant to Section 1006 of the Federal Aviation Act of 1958, as amended (72 Stat. 731, 49 U.S.C. Section 1301, et seq., "the Act"), which establishes this Court's jurisdiction.

On March 25, 1975 a panel consisting of Chief Judge Irving R. Kaufman, Circuit Judge William H. Mulligan and District Judge Roszel C. Thomsen granted Petitioners' motions for expedited consideration and for consolidation of the petitions for review of ALPA and Captain Cochran for all purposes; it also denied the Board's motion to dismiss for lack of venue and granted Petitioners a stay of CAB Order 75-2-127 pending appeal. Additionally, the panel that same day ordered that, until the completion of this Court's hearing and determination of this case, "the Civil Aeronautics Board, its officers, employees, and agents shall cease and desist from unlawfully interfering with the right of air carriers and their employees to refuse to transport property which, in the opinion of such air carriers and their employees, may be inimical to safety of flight."

A. THE HAZARDOUS MATERIALS REGULATIONS.

Federal Aviation Administration ("FAA") regulations (14 C.F.R. Part 103) define the term "dangerous articles" as including a variety of explosive, flammable, corrosive, poisonous, etiologic, radioactive and other hazardous materials listed in Department of Transportation ("DOT") regulations (49 C.F.R. Section 172.5). The terms "dangerous articles" and "hazardous materials" are used interchangeably in this brief, and both refer to those commodities subject to DOT/FAA regulations. The DOT rules set detailed packaging and labeling standards for shipping most of these articles by rail express (49 C.F.R. Part 173), and the FAA standards for shipping them on passenger and cargo aircraft incorporate DOT guidelines by specifying that, "No person may carry any dangerous article in a passenger-carrying [or cargo only] aircraft," except as in accordance with the prescribed safeguards (14 C.F.R. Sections 103.7 and 103.9). As amended on February 4, 1975, FAA regulations also provide, in relevant part:

> "Section 103.3 Certification Requirements.
>
> (a) No person may offer any dangerous article for shipment in an aircraft unless there is accompanying the shipment a clear and visible statement that the shipment complies with the content, quantity, packaging, marking, and labeling requirements of this part.
>
> . . . .
>
> (d) No person may accept any dangerous article in an aircraft unless --
>
> (1) It is accompanied by the statement required by paragraph (a) of this section; [and]
>
> (2) The inspection required by Section 103.4 discloses that the packaging, marking, and labeling of the hazardous material is in compliance with this Part. . .

"Section 103.4 Inspection Requirements.

(a) No person may carry any dangerous article in an aircraft unless, prior to placing the article in the aircraft, the operator of the aicraft has inspected the outside container in which that article is packaged and has determined that --

(1) The container has no dent, holes, leakage or other indication that the integrity of the packaging has been compromised, and. . .

(2) The labeling and marking of the container complies with the requirements of this Part. . ."

B. THE GOVERNMENT'S FAILURE TO ENFORCE ITS REGULATIONS.

Evidence that the government has failed to enforce its safety regulations for shipping hazardous materials by air is detailed in the following recent official reports and testimony at Congressional Hearings, which were described to the CAB in ALPA's February 25 filing in the proceeding below (Motion to Stay, Appendix B) and were submitted and excerpted in Exhibits 1-14 attached thereto:

*** On February 24, 1975, the National Transportation Safety Board publicly released its report on the November 3, 1973 crash of Pan American World Airways Clipper 160 at Boston, Massachusetts. The freighter flight was carrying over 25 tons of cargo, including -- unbeknownst to its crew -- 15,360 lbs of poisonous, flammable and corrosive chemicals. The NTSB concluded that the probable cause of the tragedy, which claimed the lives of all three crewmembers, was

". . . the presence of smoke in the cockpit which was continuously generated and uncontrollable." p. 36. The Board also said that the accident sequence was started by ". . . the spontaneous chemical reaction between leaking nitric acid, improperly packaged and stowed, and the improper sawdust packing surrounding the acid's package. . ." (at p. 37). "A contributing factor," the Board added (at p. 37 (emp. supplied)), was the general lack of compliance with existing regulations governing the transportation of hazardous materials which resulted from the complexity of the regulations, the industrywide lack of familiarity with the regulations at the working level, the overlapping jurisdictions [of various government agencies], and the inadequacy of government surveillance." A copy of the NTSB report was attached as Exhibit 1 to ALPA's February 25, 1975 filing at the CAB, Motion to Stay Appendix B.

*** In late December, 1974, the House Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce issued its well-publicized report, "Air Safety: Selected Review of FAA Performance" (93rd Cong., 2nd Sess.). The section on hazardous cargo, Exhibit 2, describes FAA's hazardous materials inspection and enforcement record as "notably poor. . . uninspired

and ineffective. . ." (p. 191), and cites "the indifference with which federal agencies, especially the FAA, have treated this problem over the years" (p. 182). The Subcommittee's recommendation (p. 193), comparable to the ALPA position, was that:

> "The list of hazardous materials presently allowed on passenger aircraft should be reviewed and only those essential items, such as radiopharmaceuticals, should continue to be transported."

*** On October 2, 1974, Under Secretary of Transportation John W. Barnum stated publicly that DOT investigations revealed hazardous materials violations in approximately "75 percent of all shipments checked in air terminals and airplanes," and, further, that his agency had "made the disturbing discovery that numerous shippers of hazardous materials never heard of DOT regulations. It was all news to them." A copy of this statement was attached as Exhibit 3 to ALPA's February 25, 1975 CAB filing (Motion to Stay Appendix B).

*** At the June 1974 Senate Commerce Committee Hearings, 93rd Cong., 2nd Sess. (Exhibit 4), NTSB Chairman John H. Reed testified about the very real possibility of "accidents of potentially catastrophic scope" due to the involvement of hazardous cargoes, and stated the NTSB's conclusion that "the special precautions

demanded by these risks do not seem to be fully recognized or controlled in either the public or private sectors." During these Senate Hearings, Senator Vance Hartke released a draft evaluation of FAA's hazardous materials program prepared by the FAA itself. This study (Exhibit 5) reported that an examination of 70 hazardous cargo shipments produced no fewer than 240 discrepancies. The FAA's confidential draft report also found that:

> "[FAA has] no systematic inspection effort in the field. . ."
>
> "Air carriers do not follow a comprehensive monitoring system at their freight docks. . ."
>
> "There were no full-time HM inspectors appointed in any of the [FAA] air carrier district offices visited by the evaluation team."
>
> "There is no handbook. . . providing policy and guidance for carrying out the FAA HM surveillance program."
>
> "Customer loaded freight containers often contain hazardous materials with no accompanying documentation stating the contents of the containers."

*** On May 1, 1973 the Comptroller General of the United States issued a report entitled, "Need for Improved Inspection and Enforcement in Regulating the Transportation of Hazardous Materials." (Exhibit 6). He warned that these "shipments present an increasing danger to public safety" (p. 28). The report also disclosed that a General Accounting Office sampling of 300

packages of radioactive materials turned up 175 in violation of FAA regulations (p. 17), and found that DOT's entire safety program for hazardous materials "was handicapped by (1) a lack of basic data on hazardous materials movements, (2) a small and unsystematic inspection effort, and (3) inadequate enforcement actions" (p. 1).

*** In the 1971-1972 Hearings before the House Government Activities Subcommittee of the Committee on Government Operations, 92nd Cong., 1st and 2nd Sess., Congressman Jack Brooks, Chairman of the Subcommittee, opened the Hearings by describing the existing situation as "serious" and one that "threatens to get out of control." Exhibit 7. Congressman Brooks reported that: "In recent years, the American people have been subjected to an increasing number of transportation accidents involving toxic and dangerous substances. The frequency with which these accidents occur, together with the discovery each day of many new and exotic dangerous chemicals and poisons of importance to our Nation's industrial complex, has created a danger to public safety of overwhelming dimensions."

*** A year later, the same House Subcommittee held additional hearings. (93rd Cong., 1st Sess.). At that time, William J. Burns, Director of the Office of Hazardous Materials for the Department of Transportation, appeared as the opening witness, and, asked for statistical data on violations, he provided information of violations of existing regulations which exceeded the number of shipments inspected. (Exhibit 8). Specifically, the DOT's own statistics revealed: 166 violations in a sample of 78 shipments inspected at seven airports in 1972-1973. At the 1973 House Subcommittee Hearings, ALPA reported that in over 1,000 on-the-spot surveys of cargo shipments, nine out of every ten of hazardous materials were found to be illegal. These figures and other data led Chairman Brooks to conclude (p. 80):

> "[O]ur system of regulating the shipment of hazardous materials is totally out of control."

*** ALPA's records, including numerous reports submitted to DOT, document a continuing and increasing trend of violations. All too frequently, these have produced new incidents threatening a repetition of the infamous Pan American tragedy at Boston. Among the many such incidents documented in ALPA's files, two were selected and copies of sworn affidavits from the airline

captains involved were submitted to CAB describing how toxic fumes and smoke from hazardous cargoes had forced the use of oxygen masks and unscheduled landings to forestall mid-ocean in-flight fires and how possible disaster was avoided only by the high professionalism and sound judgment of the crews. (Exhibits 9 and 10). Another incident, described in an attached report to the DOT filed by Alaska International Air, Inc., (Exhibit 11), involved an L-100-10 Lockheed Hercules aircraft at Galbraith, Alaska, and caused the death of one person and the injury of three others.

*** On January 8, 1975 FAA issued a telegraphic alert to all carriers on emergency action to be taken when hazardous materials fires occur during flight (Exhibit 12). FAA's NOTAM observed, "Investigation into a recent accident revealed that the smoke or fire, caused by oxidizing agents and certain other chemicals, could not be controlled by the existing emergency and smoke removal procedures." Pilots should therefore be warned, the NOTAM continued, ". . . that the possibility exists that they may be carrying cargo of oxidizing agents and certain other chemicals that, if ignited, could cause smoke or fire that could not be extinguished by existing emergency procedures and that any abnormal in-flight occurrence which

could be linked to dangerous articles in an inaccessible compartment or bins should be considered an unsafe condition. . requiring an immediate decision and action to land the airplane at the nearest suitable airport, in point of time, at which a safe landing can be made."

*** As described in the December 1974 House Special Investigation Subcommittee report (93rd Cong., 2nd Sess.), at pp. 179-181, over a thousand passengers aboard two Delta Air Lines aircraft were exposed to excessive radiation -- 213 persons on a DC-9 on April 6, 1974 and 917 on a Convair 880 less than two and one-half years earlier -- due to packaging errors discovered only after the event.

*** On September 17, 1974 the Joint Congressional Atomic Energy Committee issued a report entitled, "Transportation of Radioactive Material by Passenger Aircraft," 93rd Cong. 2nd Sess., which concluded that known radioactive spill incidents like those experienced by Delta "justifiably raise questions as to the adequacy of existing Government standards and enforcement of regulations for packaging and monitoring radioactive material in transit." p. 1. The report also found that even properly packaged shipments expose passengers to excessive doses of radiation since FAA's current per-package limits are ten times too high. pp. 6-9, 15. (Exhibit 13).

*** On July 30, 1974 the U. S. Atomic Energy Commission reported that existing DOT rules governing the shipment of radioactive materials on passenger planes were too lax. (Exhibit 14). As under the STOP program arrangements, the AEC recommended reducing the per-package limit from ten to three Transport Indices and totally barring higher emitting non-medical radioactive shipments from passenger carrying aircraft.

*** On January 3, 1975 President Gerald Ford signed into law the Hazardous Materials Transportation Act, Pub. L. 93-633, 49 U.S.C. Section 1801, et seq. Dissatisfied with FAA's history of failures in this area, the Congress primarily sought in enacting this law to centralize the hazardous materials regulation and enforcement functions in DOT, rather than FAA. See Sections 102 and 113(d), and Senate Commerce Committee Report No. 83-1192 accompanying S. 4057. 93rd Cong. 2nd Sess., p. 1. Yet, as DOT freely acknowledged in its instant complaints, FAA is still purporting to regulate in this critical area, notwithstanding the recent Congressional declaration divesting it of hazardous materials powers.

Thus, ALPA proved in detail in the CAB proceeding below (supra, p. 4) the truth of Congressman Brooks' conclusion that "our system of regulating the shipment of hazardous materials by air is totally out of control." Until the system is restored to order, the

Association contended, in line with the December 1974 recommendations of the House Special Investigations Subcommittee, the only prudent course to follow is to confine the types of hazardous shipments to be transported by air to those which must be so shipped, for example, because of critical medical needs, and to take extraordinary precautions even with these. And as we also showed the CAB, that is precisely the approach which ALPA has for years asked the government to adopt, without success.

C. THE ASSOCIATION'S REQUESTS FOR RELIEF AND THE FAILURE OF DOT AND FAA TO RESPOND ADEQUATELY.

On the basis of evidence such as that presented at pp. 4-12, supra, ALPA has for years waged an intense battle to secure adequate governmental regulation of the transportation of hazardous materials. Association representatives have testified four times in as many years before both Houses of Congress. They have participated in innumerable DOT/FAA meetings, hearings, seminars, conferences and rule-making proceedings. Over and over again, they have pleaded for an effective governmental program to deal with the threat of hazardous materials to aviation safety, proposed many specific improvements for our system of shipping dangerous articles, and warned that pilots would be forced to mount a nation-wide refusal to operate airplanes with such cargo aboard unless some meaningful government relief was forthcoming. A brief review of some of the ALPA-DOT/FAA correspondence on this subject, attached as Exhibits 18-26 to ALPA's February 25 CAB filing and to Motion to Stay Appendix B, demonstrates how these agencies exhausted ALPA's patience with their complacency.

On April 13, 1973 Captain J. J. O'Donnell, ALPA's President, wrote to Federal Aviation Administrator Alexander P. Butterfield; a copy of this communication was sent to Secretary of Transportation Claude S. Brinegar and attached to both was a copy of Captain O'Donnell's March 14, 1973 statement on ALPA's behalf before the House Government Activities Subcommittee. Exhibit 18. These documents related the results of ALPA on-the-spot surveys of over 1,000 cargo shipments -- revealing that nine out of every ten hazardous shipments were illegal -- and stating ALPA's position that, inter alia, all hazardous materials should be banned from passenger-carrying aircraft. On May 1, 1973, FAA's James F. Rudolph responded (Exhibit 19), minimizing the dangers involved in shipping these commodities, pointing out that FAA had initiated 73 hazardous materials violations actions during 1972, and asking that ALPA members "notify the nearest FAA air carrier district office whenever they detect apparent violations of FAR 103."

On March 20, 1974 Captain O'Donnell again requested "aggressive action" by FAA. Exhibit 20. He warned Messrs. Butterfield and Brinegar that deficiencies in FAA enforcement of hazardous cargo regulations were intolerable and that, "If effective and early action by the FAA is not forthcoming, I see as the only alternative, a flat refusal by the pilots to operate aircraft with such cargo on board." Exhibit 20, p. 2. On April 9, 1974 Mr. Butterfield replied, stating that 229 hazardous materials violations had been detected by FAA during 1973. He said he believed FAA was "taking fairly aggressive action," but that the major cause of violations was "ignorance of the law." Exhibit 21.

On July 9, 1974 Captain O'Donnell wrote once more to Mr. Butterfield, describing several unsettling events which had occurred in the intervening three months,

setting forth a variety of frightening statistics, and explaining that "airline pilots see the [hazardous materials] situation as an accident of major proportions just waiting to happen." Exhibit 22. Attached was a copy of an eleven-point hazardous materials program adopted at ALPA's 20th Executive Board Meeting in May 1974. This contained many of the specific recommendations previously made to FAA for improving the safety of shipping hazardous cargoes, and was virtually the same, absent an implementation date, as the ALPA Board of Directors resolution enacted in November 1974. On July 24, 1974 FAA's R. P. Skully replied. Exhibit 23. While conceding many of the factual points in ALPA's letter, he again minimized the gravity and urgency of the situation and merely reiterated Mr. Rudolph's request for ALPA members to advise FAA's district offices of "apparent violations".

At its biennal meeting in November 1974 ALPA's Board of Directors, the Association's governing body composed of directly elected pilot representatives from all ALPA-represented airlines, unanimously endorsed and approved the Executive Board's eleven-point hazardous materials resolution, which included the Safe Transportation Of People program. This program, as detailed below, calls for an embargo on the carriage of hazardous materials on passenger aircraft beginning on February 1, 1975; it is described in a newsletter entitled, "Of Pilot Interest," which was sent to all member pilots under the date of January 1, 1975. Exhibit 17. This ALPA communication contained the full eleven-point hazardous materials program and explained, at pp. 1-2:

> "For more than three years the Air Line Pilots Association has been working to resolve this issue through the federal regulatory and legislative processes. We have <u>literally</u>

camped on the doorsteps of DOT, and other agencies involved in transportation and safety. We have repeatedly taken our case to Congress; appearing before four major hearings of the U. S. Senate and House of Representatives. Here is how these efforts now stand:

* Although recognizing the problem, FAA does not consider it of sufficient magnitude to justify any type of emergency action at this time.

* Finally, Congress has passed hazardous materials legislation which at this time is on President Ford's desk for signature.

"Off the record, it has been suggested that the reason for this inactivity is the 'lack of visibility' of the peril. In other words, not enough people have been killed or injured.

"From ALPA's viewpoint, the casualty rate is already intolerable. Last year, for example, three Pan Am freighter pilots met tragic deaths at Boston following a spillage of illegally shipped acids and other chemicals. The same potential for catastrophe was very much in evidence in recent months when several other flights had to make emergency landings because of in-flight spillages of dangerous cargo.

"The well-publicised radiation accidents have exposed more than 1,000 passengers and crew members to potential genetic damage that may take decades to detect. Scores of ground agents have been subjected to similar perils or worse. And over 100 other incidents are on file at DOT where death or serious injury was averted primarily by sheer luck. (We will never know, of course, how many more incidents were <u>not</u> reported.).

"Congressman Jack Brooks sums up the situation this way: It is only a matter of time before luck is going to run out. . . FAA's system of regulating the shipment of hazardous materials by air is totally out of control!

> "In the face of this growing peril, and with no federal action forthcoming to stop it, your Board of Directors could come to but one conclusion: The situation as it now exists is intolerable! As we have repeatedly warned FAA, the only alternative now is to eliminate the threat through concerted pilot action. Therefore, your Association's Board of Directors. . . has taken decisive action to bring under control what has become in recent years one of the most serious threats to air safety: hazardous cargo aboard our aircraft."

On January 9 and 23, 1975, after the public announcement of Operation STOP, DOT and FAA representatives requested a meeting with ALPA officials and there asked that the program's February 1 implementation be postponed. Exhibit 24. At this meeting General Benjamin O. Davis, Jr., DOT's Assistant Secretary for Safety and Consumer Affairs, displayed a copy of ALPA's January 1 newsletter, Exhibit 17, and announced that a DOT/FAA task force was being assembled to review the Association's eleven safety recommendations. He acknowledged ALPA's important role in stimulating legislation and governmental activity on hazardous materials and the need for further action to improve the safety of shipping these items by air, but promised only prospective relief at an unspecified date in the future, without any assurance of an immediate, adequate government response. Exhibit 24.

On January 30, 1975 Captain O'Donnell responded to the appeal of Messrs. Brinegar and Butterfield and their representatives for a postponement of the STOP program. He reminded them again of the urgent need for interim relief while reforms were being considered, adopted and implemented and even suggested a form of interim relief which

would alleviate the need for the established February 1 implementation date for the STOP program -- an immediate, temporary embargo paralleling the STOP guidelines. Exhibit 25. On January 31, 1975 DOT's Undersecretary John W. Barnum responded with a telegram declining to accept this proposal for interim relief pending effective governmental action, despite DOT's conceded authority to do so, on the ground that DOT's "experts" did not see "a sufficient factual record" for it. Exhibit 26. Instead, he characterized ALPA's program as "an attempt by ALPA to usurp the authority vested in the Congress by the Constitution for the regulation of commerce." Id. On February 1, 1975, in the absence of an adequate action program by DOT/FAA to make the transportation of dangerous commodities by air even minimally safe, Operation Stop began.

D. THE SAFE TRANSPORTATION OF PEOPLE PROGRAM.

At one minute past midnight on February 1, 1975, after years of urging the federal government to take effective regulatory action against the growing threat of hazardous cargoes to the safety of air transportation, ALPA initiated Operation STOP. As we explained to the CAB, the essence of the STOP program is to improve upon the minimum safety restrictions described in DOT/FAA hazardous materials regulations by banning from passenger aircraft all hazardous materials, as defined in 14 C.F.R. Part 103 and 49 C.F.R. 172, et seq. Excepted are certain critical medical supplies, including radioactive pharmaceuticals, which must be shipped to many areas by air in order to avoid delays, dry ice used to refrigerate perishable goods, and magnetic materials, when these are properly classified, marked, labeled, packaged, segregated, loaded

and stowed in accordance with applicable federal regulations. In addition, for all-cargo flights there are also STOP program restrictions, since flight crews are entitled to consideration, too, and these allow the carriage of only those commodities and quantities of hazardous materials now acceptable for passenger aircraft.

As further explained to the Board, air carriers, other labor organizations and hazardous materials manufacturers, shippers and users have universally cooperated with the STOP program. Airlines have filed embargo notices and embargo extension applications at the CAB, and adequate arrangements have been made for alternative surface transportation for virtually all of the banned hazardous materials, even though existing federal law prohibits transporting most of them, except in emergencies, on passenger-carrying trains, vessels or motor vehicles. See, e.g., 18 U.S.C. Section 832, 46 C.F.R. Part 147, 49 C.F.R. Sections 177.870, 176.902-03. Not a single pilot has been disciplined for actions taken pursuant to the STOP program, and only one legal challenge has been lodged against it.

E. THE ACTIONS OF DOT/FAA AND CAB HEREIN.

The case at bar involves the sole legal challenge to the STOP program. It raises the issue of whether CAB-certificated air carriers and their pilots have the right to surpass the minimum safety standards set by the DOT/FAA for transporting dangerous articles by rejecting freight which they believe may be inimical to safety of flight.

The proceedings below were instituted on February 10 and 14, 1975, with the DOT/FAA's filing of formal complaints against fourteen airlines at the CAB. (The complaints are submitted herein as Motion to Stay Appendix A). The complaints charged

that since February 1, 1975 the airlines had been violating their common-carrier responsibility to provide service by embargoing hazardous cargoes. DOT/FAA asked, among other things, that CAB "reject" the embargo notices the air carriers had filed pursuant to Part 228 of CAB's regulations, 14 C.F.R. Part 228, on the ground that DOT/FAA was the sole entity to determine which articles were unsafe for transport and that the airlines, as common carriers, were obligated to accept everything else. DOT/FAA has enacted, or is now in the process of enacting, safety regulations allowing the carriage of some, but not all, hazardous articles on passenger and cargo aircraft, the DOT/FAA argument continued, and "air carriers are no longer free to determine that the balance should be struck more in the interest of safety." (Answer of the United States Department of Transportation, etc., p. 4, March 13, 1975, CAB Docket 27588, Supplemental Documents, p. 4).

ALPA and the carriers filed in opposition to the DOT/FAA complaints, insisting that CAB must allow the embargoes to remain in effect. (ALPA's February 25, 1975 filing was submitted to this Court as Motion to Stay Appendix B; some of the airline responses and applications to extend their embargoes appear in Motion to Stay Appendix C). ALPA explained that it had reasonably concluded, on the basis of the findings of numerous recent studies, including those of ALPA, the National Transportation Safety Board, the U. S. House of Representatives Special Subcommittee On Investigations, the General Accounting Office, and the DOT and FAA themselves, that the government's inspection and enforcement program for hazardous materials was virtually nonexistent and that ignorance and misunderstanding of the complex regulations governing the shipment of

dangerous articles prevailed among the shippers, packers, manufacturers, forwarders and carriers responsible for complying with them. Indeed, the official statistics demonstrate, as ALPA pointed out, that an examination of a random sampling of hazardous articles shipments will likely yield as many or more violations of the applicable safety rules as there are packages. In these circumstances, we contended, with no meaningful governmental relief in sight depite ALPA's repeated pleas, Operation STOP was appropriately begun on February 1, 1975 under, inter alia, the statutory responsibility of every air carrier to "provide safe and adequate service" and to "refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." (Sections 404(a) and 1111 of the Federal Aviation Act of 1958, as amended ("the Act"), 40 U.S.C. 1374(a) and 1511 (emph. supplied)). Williams v. Trans World Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), affirmed, ___ F.2d ___ (2nd Cir., No. 74-1469, decided January 10, 1975).

The Association further contended that DOT/FAA's regulations (supra, at pp. 3-4) never require the acceptance of hazardous cargoes, but only their rejection when these minimum safety standards are not met. The air carriers and their pilots were free to surpass the government minima, therefore, and to reject any freight which they believe might prove dangerous. We also pointed out that such a refusal to carry classes of hazardous articles was specifically authorized by CAB's tariff rules, which provide that airline tariffs for explosives and other dangerous articles ". . . may contain restrictions on the extent to which participating carriers will accept for transportation such explosives and other dangerous or restricted

articles" (14 C.F.R. Section 221.104), so long as the tariffs show ". . . the articles which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking, and labeling requirements have been met" (14 C.F.R. Section 221.38(a)(5)).

The airlines' responses to the DOT/FAA complaints generally followed the lines of ALPA's justification. Some carriers merely stood on their pilots' announced intention to refuse to fly the embargoed materials and the absence of any CAB authority to interfere; for, the Board's embargo regulations contemplate the institution of embargoes and their maintenance for at least 30 days by the airlines themselves, without prior CAB approval, and define an "embargo" as "the temporary refusal by an air carrier to accept for transportation. . . any commodity, type or class of property (other than passenger baggage) duly tendered, where, because of. . . compelling reasons not within the control of the carrier, it is temporarily unable to perform all of the authorized transportation service requested of it." (14 C.F.R. Section 228.1).

Other carriers, however, more aggressively asserted their concern about the safety of continuing to transport dangerous articles in the present climate of regulatory languor, and their right to exercise independent judgment in determining whether to exclude allowable hazardous cargo without governmental interference. United Airlines, for example, relied upon Section 1111(a) of the Act (Answer of United Airlines, Inc., March 10, 1975, at p. 8); Delta argued that air carriers were always entitled to exceed

DOT/FAA minimum safety standards (Answer of Delta Air Lines, Inc., March 3, 1975, at pp. 7-8); and Trans World explained that its embargo was properly "designed to insure safe operation of its aircraft" (Answer of Trans World Airlines, Inc., February 19, 1975, at p. 2). In support of its indefinite embargo extension, Frontier Airlines acknowledged its own lack of particular expertise with regard to hazardous materials, but nevertheless maintained, "[W]e are dedicated to placing the safe transportation of our passengers and employees above all other considerations, and we believe serious doubt has been cast upon the adequacy of existing safety regulations." (Frontier Airlines, Inc. February 14, 1975 Application to Extend Embargo, at p. 1, submitted herein as part of Motion to Stay Appendix C). Among the many pieces of evidence relied upon were the admissions of top-level DOT officials that over 75 percent of hazardous articles offered for shipment by air were in violation of the applicable federal regulations (Id., at p. 2), and the Congressional determination, in enacting the Hazardous Materials Transportation Act, Pub. L. 93-633, January 3, 1975, that more caution and regulatory reform were vitally needed to enable the country's system of shipping hazardous materials to operate properly.

Late in the afternoon of March 3, 1975, without even addressing itself to ALPA's contentions, the CAB "rejected" the embargo notices filed by nine airlines as "in derogation of the carriers' common-carrier obligation to carry, and their statutory obligation to provide adequate service." (Order 75-2-127, at p. 3).

F. SUBSEQUENT ADMINISTRATIVE AND JUDICIAL PROCEEDINGS.

ALPA immediately petitioned the CAB for reconsideration and for a stay pending further administrative and judicial proceedings. In its March 5, 1975 filing the Association reiterated the legal arguments which the Board had overlooked in Order 75-2-127 and demanded a hearing with regard to any material fact in dispute. 1/ We also argued that a stay pending further review was especially appropriate here since it would safeguard airline employees and the traveling public without harming others. When over a week had elapsed with no CAB response, the instant judicial proceeding was instituted on March 13, 1975.

On March 20, 1975, the Board finally took action on ALPA's petition for an administrative stay, as it put it, "for the convenience of the Court." (Order 75-3-61, p. 1, n. 2). The Board denied ALPA's request for a stay, and attempted to supply the rationale, absent from Order 75-2-127, for forcing airlines and their pilots to accept a variety of undesired dangerous articles on passenger and cargo aircraft (Order 75-3-61, pp. 2-4).

1/ A hearing was specifically requested (Petition, p. 3) as to the Board's erroneous factual finding that the STOP program had interfered with the transportation of "many items necessary for medical or other important purposes" (Order 75-2-127, p. 3). As ALPA pointed out in its Petition, the Board's reliance upon this disputed fact, without conducting a hearing, ignored elementary notions of fair procedure and deprived ALPA and its members of due process of law.

Yet, the Board again failed to suggest a single provision of the Act or CAB regulations empowering it to "reject" without a hearing the formally proper embargo notices of certificated air carriers. Instead, the Board merely stated its agreement with the DOT/FAA theory, supra, at p. 20, that those agencies, by enacting or proposing safety standards for the transportation of hazardous materials by air, had "thus preempted this area of regulation," and that "air carriers are no longer free to determine that the balance should be struck more in the interest of safety." (Order 75-3-61, at p. 3). 2/ Significantly, however, not a word was said to contest or minimize ALPA's showing that the DOT/FAA regulations were so widely ignored and poorly enforced that they had become nonexistent, for all practical purposes, in the real world of hazardous materials transportation. Nor did the Board dispute that it was a good faith concern over this unsettling situation which motivated the actions of airlines and their pilots.

On March 25, 1975, as noted above at p. 2, this Court disposed of several motions then pending before it in this proceeding, including Petitioners' Motion for a Stay and Such Other Injunctive Relief as Will be Necessary to Preserve the Status Quo Pending Appeal, which was granted.

2/ The Board refused to conduct a hearing on the scope and effect of the ALPA and airline embargoes involved herein, as had been requested, apparently choosing to rely instead upon certain unspecified "informal correspondence" (Order 75-3-61, p. 4, n. 5).

A R G U M E N T

I. THE BOARD'S ORDER UNLAWFULLY INTERFERES WITH THE RIGHT OF AIRLINES AND THEIR EMPLOYEES TO REFUSE TO TRANSPORT PROPERTY WHICH THEY BELIEVE MAY BE INIMICAL TO SAFETY OF FLIGHT.

The government's theory in this case is that DOT/FAA is the sole responsible safety entity with regard to the shipment of hazardous cargoes by air; that DOT/FAA has enacted, or is in the process of enacting, safety standards which allow the shipment of some, but not all, hazardous materials on passenger and cargo aircraft; and, consequently, that "air carriers are no longer free to determine that the balance should be struck more in the interest of safety." Petitioners submit, however, that DOT/FAA has merely established the minimum safety standards which must be satisfied before transporting allowable hazardous materials; that neither the Act, nor the regulations of DOT/FAA, nor those of CAB, ever require the acceptance of any hazardous articles for shipment; and that these agencies have no authority to interfere, as attempted herein, with the good faith assertion by airlines and their employees of their right to surpass the government's minimum safety requirements and to refuse to carry freight which they believe may prove inimical to safety of flight. As we shall now demonstrate, there was a compelling need for ALPA and the nation's airlines to institute the Safe Transportation of People program on February 1 of this year. In the proceedings under review, however, the government has unlawfully attempted to interfere with the temporary and limited embargo on hazardous freight imposed pursuant to Operation STOP.

For, as shown below, airlines retain the right under both the common law and Sections 404(a) and 1111 of the Federal Aviation Act to exercise the independent judgment necessary to decide for themselves when to exceed the DOT/FAA's minimum safety standards by refusing to accept cargo which they honestly believe may be inimical to safety of flight. The Board and the DOT/FAA are attemting to overrule the long-standing common law right of a common carrier to refuse undesirable cargo and passengers without overruling its co-extensive common law "responsibility to protect its passengers from danger and inconvenience." Williams v. Trans World Airlines, Inc., 369 F. Supp. 797, 805 (S.D.N.Y. 1974), aff'd. ___ F.2d ___ (No. 74-1469, 2nd Cir., decided January 10, 1975). Accord, California Powder Works v. Atlantic etc. R. Co., 45 P. 691, at 692-693, 113 Cal. 329 (1896); Pearson v. Duane, 71 U. S. (4Wall.) 605 (1866). These agencies are also attempting to repeal the explicit Congressional guarantee that air carriers would retain this common law right, for Section 1111 of the Act expressly empowers an air carrier to ". . . refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." As this Court held in Williams v. Trans World Airlines, Inc., supra, sl. op. at 1272-74, Congress intended that its guarantee of a carrier's independent judgment in this critical area would supersede the carrier's general statutory obligation to provide service, even if the carrier and its employees relied solely on offical government warnings regarding the potential dangers of providing the service in question. And this Court's decision is correct and applicable here, as the legislative history underlying the enactment and recent reenactment of Section 1111 demonstrates, since Congress also expressed its intention that the honest doubt of a carrier and its employees about the safety of carrying dangerous freight or passengers would adequately justify a good faith refusal to furnish transportation.

As detailed in the Statement, supra, all of the relevant facts involved in this case are undisputed. 3/ For years ALPA's hazardous materials specialists and other concerned and knowledgeable citizens have protested the inadequacy of governmental regulation of the transportation of dangerous cargo. DOT/FAA regulations prohibit shipping thousands of articles specified as hazardous unless prescribed safeguards are met, but even these minimum standards are widely ignored and seldom enforced. Official government studies confirm the findings of ALPA's own investigators that it is only a matter of time before hazardous cargoes cause another tragedy, perhaps one of catastrophic proportions.

3/ The Board has erroneously and improperly resolved one factual dispute concerning the scope and effect of the ALPA and airline embargoes involved herein, however, without conducting a hearing (see nn. 1 and 2, supra). By crediting and relying upon certain unspecified "informal correspondence" (Order 75-3-61, p. 4, n. 5), as against the facts alleged in ALPA's pleadings, the Board has thus deprived the Association of due process of law and invalidated the rulings under review. See, e.g., Richardson v. Perales, 402 U. S. 389, 414 (1971); Sindermann v. Perry, 408 U. S. 593 (1972); cf. N.L.R.B. v. Joclin Mfg. Co., 314 F.2d 627, 630-32 (2nd Cir. 1963). However, a remand for a hearing on this issue would be an exercise in futility, unless the Court first corrects the Board's overly expansive view of its authority; and such a remand will be unnecessary if the Court accepts our view of the law. We shall therefore proceed to the merits.

Thus, the National Transportation Safety Board, in a report released to the public on February 24, 1975, found that the fatal Pan American World Airways crash at Boston on November 3, 1973 was caused by improperly packaged and loaded hazardous cargo, and that, in the NTSB's opinion, "A contributing factor was the general lack of compliance with existing regulations governing the transportation of hazardous materials which resulted from the complexity of the regulations, the industrywide lack of familiarity with the regulations at the working level, the overlapping jurisdictions [of various government agencies], and the inadequacy of government surveillance." The report of the House Special Subcommittee on Investigations, publicly released in December 1974, concluded that FAA's hazardous materials inspection and enforcement record was "notably poor. . . uninspired and ineffective" and cited "the indifference with which federal agencies, especially the FAA, have treated this problem over the years." These conclusions are fully supported by the findings of a secret study conducted by the FAA itself, that a sampling of 70 hazardous cargo shipments had revealed no fewer than 240 discrepancies. Similarly, a DOT study disclosed 166 violations of the agency's hazardous materials regulations in only 78 shipments. These government studies corroborated the accuracy of ALPA's own survey of more than 1,000 articles, which found nine out of every ten shipments of hazardous materials to be illegal, rather than the cautious concessions of Undersecretary of Transportation John W. Barnum, made on June 12, 1974 and repeated on October 2, 1974, that DOT investigators were only finding hazardous materials violations in approximately "75 percent of all shipments checked in air terminals and airplanes."

Nevertheless, regardless of whether one accepts DOT's estimate that 25 percent of hazardous materials are legal or ALPA's estimate of 10 percent, one must agree with Congressman Jack Brooks' assessment that, "Our system of regulating the shipment of hazardous materials by air is totally out of control." In short, the federal regulations supposedly ensuring the safety of those transporting these materials simply do not exist in the real world of shipping firms and freight docks.

Faced with this disturbing evidence of an inadequate government inspection and enforcement program for hazardous cargoes, and confronted with an alarming increase in the number of actual incidents threatening a repetition of the infamous Pan American tragedy at Boston, ALPA's course was clear. The Association felt compelled to repeatedly plead for effective relief from the responsible aviation safety officials in government. In a series of communications dating back to April 13, 1973 with then Secretary of Transportation Claude S. Brinegar, then Federal Aviation Administrator Alexander P. Butterfield, and others, ALPA President J. J. O'Donnell over and over again documented the frightening deficiencies in the federal regulation of hazardous materials shipments, proposed numerous specific improvements which ALPA specialists felt were necessary, requested "aggressive action" in the area of government education, enforcement and inspection and an interim ban on unnecessary hazardous materials shipments by air, and warned, "If effective and early action by the FAA is not forthcoming, I see as the only alternative, a flat refusal by the pilots to operate aircraft with such cargo on board." In response, the government conceded its authority to take the interim and long-term action proposed by the Association, but consistently insisted that its

detection of 73 hazardous materials violations during 1972 and 229 in 1973 proved that FAA was already "taking fairly aggressive action" and that there was not "a sufficient factual record" even for a temporary embargo.

Finally, elected pilot officials from throughout the country unanimously voted in November 1974 to set February 1, 1975 as the implementation date for the STOP program. These men voted not to wait for an accident of potentially catastrophic proportions to take effective action against the threat of hazardous cargoes to aviation safety; for, to them, the proven risks -- and the present casualty rate -- were already too high. Although DOT/FAA finally assembled a task force in January 1975 to review ALPA's numerous specific proposals for improving the safety of shipping hazardous cargo, no adequate government response intervened, and ALPA and the nation's airlines began Operation STOP, as scheduled, on February 1.

The STOP program continues today. Its essence is the rejection of explosive, flammable, corrosive, poisonous, etiologic, radioactive and other dangerous articles, as defined in Federal regulations, for carriage on passenger-carrying aircraft. Nevertheless, an exception has been made for certain critical medical supplies, such as radioactive pharmaceuticals, which must travel to many areas by air in order to avoid delays; and adequate surface transportation has been arranged for virtually all of the banned hazardous articles, even though existing federal law prohibits their shipment, except in emergencies, on passenger-carrying trains, vessels and motor vehicles.

In finding in Order 75-2-127 that airlines must carry dangerous cargo, regardless of their concern, the CAB relies upon the obligation of airlines to provide adequate service. However, the relevant statutory language actually imposes a duty to "provide safe and adequate service" (Section 404(a) of the Act, 49 U.S.C. 1374(a), emph. supplied)). And while the Act acknowledges the Secretary of Transportation's "duty to promote safety of flight of civil aircraft" (Section 601(a), 49 U.S.C. 1421(a)), it also recognizes "the duty resting upon air carriers to perform their services with the highest possible degree of safety" (Section 601(b), 49 U.S.C. 1421(b) (emph. supplied)).

This duty of an air carrier to conduct its operations safely particularly rests, as is well known, upon its pilots. Thus, Federal Air Regulation 91.3(a) (14 C.F.R. Section 91.3(a)) provides: "The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." The federal regulations also prohibit an airline captain from signing the dispatch release form required prior to each flight unless he "believe[s] that the flight can be made with safety." (FAR 121.597 and 121.663), 14 C.F.R. Sections 121.597 and 121.663).

Significantly, moreover, the CAB has long recognized that an airline's common carrier duty to provide service must yield to its judgments regarding safety. See, e.g., Adler v. Chicago & Southern Airlines, Inc., 4 CAB 113, 116-117 (1943). And only last month the FAA described in its official house organ how it cited a pilot for non-compliance with hazardous materials regulations when a passenger brought aboard an improper shipment because, "[T]he pilot-in-command of any aircraft is always accountable for conducting a flight that is not in compliance with regulations. . ." (FAA Aviation News, Vol. 13, No. 9, February 1975, at p. 4. Motion to Stay Appendix F).

The courts have long held, accordingly, that a logical corollary to the obligation of a common carrier to conduct safe operations is its right and duty to exercise independent judgment and decline to accept passengers and freight deemed by it to be unsafe. This legal right of a common carrier to refuse undesirable cargo and customers was recognized at common law, as co-extensive with the carrier's "responsibility to protect its passengers from danger and inconvenience." Williams v. Trans World Airlines, Inc., 369 F. Supp. 797, 805 (S.D.N.Y. 1974), aff'd ___ F.2d ___ (No. 74-1469, 2nd Cir., decided January 10, 1975). Accord, California Powder Works v. Atlantic etc. R. Co., 45 P. 691, at 692-693, 113 Cal. 329 (1896) (it is "optional" whether a common carrier wishes to receive such "dangerous articles as nitroglycerin, dynamite, gunpowder, aquafortis, oil of vitriol. . ."); Pearson v. Duane; supra, Jencks v. Coleman, 13 Fed. Cas. No. 7,258, at 443-444, 2 Sumn. 221 (C.C.R.I. 1835) (per, Story, J.). Although the CAB entirely ignored the existence of this right in the Order under review, it is now statutorily guaranteed by Section 1111 of the Act, 49 U.S.C. 1511, which expressly empowers air carriers to ". . . refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight."

Section 1111 was originally introduced into the Act as part of Pub. L. 87-197, enacted on September 5, 1961 (75 Stat. 467), a statute primarily directed towards alleviating the threat of hijackings to air safety. This provision was added in committee and was reenacted only last year. Its legislative history clearly establishes that it applies to rejections of dangerous cargo, as well as passengers, and also that the sole basis necessary for a lawful refusal to carry is the honest belief of the carrier or its employees that the cargo or passengers may prove dangerous.

Thus, Stuart G. Tipton, then president of the Air Transport Association, testified in the original House Hearings that he favored this provision so that ". . . if an airline, in its judgment, has reason to believe that a passenger intends harm to the airline that passenger can be rejected. . . and if we find any cargo we think is dangerous we should have the clear right to reject it." Hearings before the House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, August 7 and 8, 1961, 87th Cong., 1st Sess., p. 63. In response to a question from Subcommittee Chairman Congressman John Bell Williams, moreover, Mr. Tipton made it clear that he supported the retention of the language "in the opinion of the air carrier" as the basis for triggering the authority to refuse transportation; and, he further explained that, ". . .if the carrier had such an opinion, . . . that would include its employees as well, and if they had such an opinion, then they would be protected." Id., at 63-64. Similarly, the airlines' common carrier duty was discussed in the 1961 Senate Subcommittee Hearings (Hearing Before the Senate Commerce Committee's Aviation Subcommittee, August 4, 1961, 87th Cong., 1st Sess., at p. 48); and, when this provision (Section 1111) was suggested, the following colloquy took place:

> "Mr. Tipton: First, I think that it is an excellent suggestion. Second, I think the important thing is that it be framed as being in the judgment of the air carrier, or its employees. That does give a carrier protection against a mistake, and there may well be mistakes.
>
> Senator Monroney: As long as it is an honest mistake. . .
>
> Mr. Tipton: If it is an honest mistake then we would be relieved. I think that would be a very useful provision in this statute."

The relevant portion of Section 1111 was enacted without opposition and was reenacted only six months ago by Section 204 of the Air Transportation Security Act of 1974, 49 U.S.C. 1511, Pub. L. 93-366, 92 Cong., 2nd Sess., August 5, 1974. Its reenactment was intended, in the words of the Congressional Conference Report, No. 93-1194, July 12, 1974 U. S. Code Cong. and Adm. News 2814, 2828, emph. added, to continue in effect the authority of any air carrier to "refuse transportation of a person or property when the carrier feels that such transportation might be inimical to safety of flight." With its enactment of this provision on September 5, 1961 and its recent reenactment last year the Congress has clearly reconfirmed the legal right of airlines and airline pilots to reject shipments of any goods which they in good faith believe to be unsafe. As this Court held in Williams v. TWA, supra, ___ F.2d ___, sl. op. at 1272, ". . .Congress did not intend that the provisions of Section 1374 would limit or render inoperative the provisions of Section 1511. . ."

Contrary to the government's contention, the statutory phrase, "Subject to reasonable rules and regulations prescribed by the Administrator," does not limit a carrier's right to reject freight it deems dangerous under Section 1111(a). As with the regulations themselves, this provision only deprives carriers of the right to accept hazardous materials which do not comply with the FAA's minimum safety standards.

The government's strained interpretation ignores the fact that these are safety provisions, designed to reduce potential hazards to air commerce. The obvious purpose of federal restrictions in this area is to limit what airlines may carry to that which will not threaten the safety of their operations.

Thus, present DOT/FAA regulations prohibit the transportation of some dangerous goods altogether and others when improperly packaged, marked, labeled, etc. (see, e.g. 14 C.F.R. Sections 103.3(a), 103.4(a), 103.7 and 103.9). Similarly, the Congress has directed the issuance of regulations barring the shipment of certain radioactive materials on passenger aircraft by May 4, 1975 (Section 108 of the Hazardous Materials Transportation Act, 49 U.S.C. Section 1807, Pub. L. 96-633, January 3, 1975), and FAA has published a Notice of Proposed Rule-Making under which further restrictions will be imposed on the cargo airlines may accept for carriage (FAA Docket No. 14249, Notice No. 75-2, 40 Fed. Reg. 5168-69, February 4, 1975). Indeed, the full text of Section 1111 reveals that its purpose is to limit, rather than expand, what goes on airplanes; for, Section 1111(a) also directs the formulation of regulations requiring the rejection of passengers and cargo when consent to a search is withheld.

In this regulatory context it would unnecessarily create an anomaly to read Section 1111 as confirming the right of air carriers to refuse to accept passengers and freight which they believe may prove dangerous, and as simultaneously requiring the acceptance of hazardous cargoes simply because they apparently meet certain minimum standards. Such a reading would force airlines and airline pilots into the untenable position of operating aircraft under conditions they believe are unsafe, contrary to their responsibilities under other provisions of the Act and the regulations (see, p. 32, supra), and contrary to long-standing aviation practices and common sense.

The statutory phrase quoted above merely requires airlines to reject passengers and property declared dangerous in accordance with the "reasonable rules and regulations prescribed by [DOT/FAA]," and does not require the acceptance of cargo deemed unsafe by the airlines and their employees. As has always been true in the field of aviation, the government is merely setting minimum standards here; air carriers and pilots are always free to surpass these if they so desire.

DOT/FAA could thus require, because of the unique nature of air transportation, that air carriers refuse to accept all dangerous articles for carriage. Yet, under Sections 1111 and 404 of the Act and their general common carrier responsibilities, airlines and airline pilots need not merely wait endlessly for DOT/FAA to require the rejection of dangerous cargoes. Williams v. TWA, supra., ___ F.2d ___, sl. op. at 1272-74. Rather, they are entitled to surpass DOT/FAA safety minima and impose the limited and temporary bans on hazardous cargoes involved in Operation STOP in order to safeguard themselves, and the passengers who rely on them, from freight which they feel may be "inimical to safety of flight."

DOT/FAA may contest the government findings discussed in detail above and argue that only individual packages of hazardous cargo in noncompliance with regulations may be rejected, but that would not place a burden upon an embargoing carrier to investigate the underlying accuracy of these studies and choose, at its peril, which official pronouncements to believe and which cargo to accept. Honest doubt is enough to justify excluding these goods, since "Congress was certainly aware that . . . the carrier's

formulation of opinion would have to rest on something less than absolute certainty." Williams v. TWA, supra, ___ F.2d ___, sl. op. 1273. To paraphrase the District Court's ruling in Williams v. TWA, supra, 396 F. Supp. at 805-806, upholding that carrier's refusal to board a passenger on the basis of an FBI report even though it did not investigate the accuracy of the report, "To hold that such a non-governmental instrumentality must review those [official government studies into the dangers of shipping hazardous materials by air]. . . would be to place an unreasonable burden upon it." For, as this Court ruled in affirming the District Court, Williams v. TWA, supra, ___ F.2d ___, sl. op. at 1272-1273, Congress did not impose a burden on air carriers acting under Section 1111 ". . . to make a thorough inquiry into the intelligence received [or] its sources . . ." The airlines and airline pilots rely, perhaps conservatively, on the studies documenting the uncontrollable risks arising from the acceptance of hazardous cargoes. Their good faith belief that it is better to err on the side of safety should be upheld by this Court, for it is in accordance with long-standing aviation practice, common sense, and the duties imposed on them by law.

II. THERE IS NO MERIT IN ANY OF THE TECHNICAL AND PROCEDURAL DEFENSES WHICH MAY BE INTERPOSED.

We anticipate that CAB counsel, recognizing the weakness of the Board's legal position herein, may attempt to interpose one or more technical or procedural defenses to defeat the petitions for review. Such a scheme cannot prevail.

A. Venue.

Any challenge to venue at this point should be summarily dismissed. In opposing Petitioners' Motion to Stay, the Board's primary argument was that the requested pendente lite relief should have been denied on the ground that venue was improperly laid in this Circuit. As shown at pp. 10-14 of Petitioners' March 25, 1975 Reply Memorandum in Support of the Motion to Stay, however, ALPA clearly "resides" in New York for purposes of obtaining review of CAB action in this Court pursuant to Section 1006(b) of the Act, 49 U.S.C. 1846(b). "Venue," as this Court has noted, "is a concept of convenience," and there is ". . . no reason for treating this case as an exception to the principle affording a litigant wide latitude in his selection of a forum where Congress has given him a choice." (Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2nd Cir. 1962), cert. denied, 372 U. S. 954 (1963); Pan American World Airways, Inc. v. C.A.B. 380 F.2d 770 (2nd Cir. 1967), aff'd by an equally divided Supreme Court, 391 U. S. 461 (1968); see, also, Denver & Rio Grande R. R. v. Brotherhood of Railroad Trailmen, 387 U. S. 556 (1967); American Airlines, Inc. v. Air Line Pilots Association, International, 169 F. Supp 777, 783 (S.D.N.Y. 1958)). In any event, the purported defect concerning venue has been fully cured, and this Court's March 25, 1975 denial of the Board's Motion to Dismiss for lack of proper venue finally disposes of the issue.

B. Standing.

Similarly unpersuasive would be an attack on Petitioners' standing to obtain review of the Board's action herein. For such considerations had nothing whatsoever to do with the basis for the Board's rulings. And thus fully applicable to this case is the Court's

holding in Trailways of New England, Inc. v. C.A.B., 412 F.2d 926 (1st Cir. 1969), in which the Court summarily dismissed a challenge to standing where, "No reliance [was] placed by the Board upon any lack of standing of the petitioners." See, also, Palisades Citizens Association v. C.A.B., 420 F.2d 188 (1960). CAB counsel's attack on standing grounds was fatally flawed, as the Court explained in Trailways of New England, Inc. v. C.A.B., supra, since:

> "On review nothing is clearer than the principle that we examine the Board's reasons and not the subsequent rationalization of its counsel. Burlington Truck Lines, Inc. v. United States, 1962, 371 U. S. 156, 168-69. The agency cannot be affirmed by supplying reasons and facts that it had neither found nor considered to be relevant. We take the case on the Board's own statement.

Here, the Board expressly disclaimed any reliance upon the issue of ALPA's standing and in fact purported to pass upon and adjudicate our contentions (Order 75-3-61, n. 2). Accordingly, no defense of the Board's actions herein on grounds of standing can succeed. 4/

4/ This is particularly true in cases such as this, where Petitioners clearly have a substantial interest in the decisions under review. See, Transcontinental Bus System, Inc. v. C.A.B., 383 F.2d 466 (5th Cir. 1966), cert. denied 390 U. S. 920; Kodiak Airways, Inc. v. C.A.B., 447 F.2d 341 (D. C. Cir. 1971); and, authorities cited and discussed therein. See, also, Pesikoff v. Secretary of Labor, ___ F.2d ___ (No. 72-2206, D. C. Cir. decided May 3, 1974), at sl. op., pp. 4-6; Curran v. Laird, 420 F.2d 122, 126 (D. C. Cir. 1969); Seaboard & Western Airlines v. C.A.B., 181 F.2d 515 (D. C. Cir. 1950); National Coal Ass'n. v. F.P.C., 191 F.2d 462, 466 (D. C. Cir. 1951); Sierra Club v. Morton, 405 U. S. 727 (1972); United States v. S.C.R.A.P., 412 U. S. 669 (1973).

C. Mootness.

In arguing against a stay of Order 75-2-127, the Board somewhat cryptically contended that such judicial action was unnecessary because its decision had "no practical consequences" and therefore "a stay of the order would accomplish nothing." (CAB Response in Opposition, pp. 11-12). If that were actually the case, it would lead one to wonder why the Board bothered to issue the order in the first place and then proceeded to oppose a stay. But the contention is far from sound.

With the purported "rejection" of nine airlines' embargo notices in the proceeding below, the Board decreed that these carriers must accept undesired hazardous materials for shipment. While it is true that these 30-day notices had expired by their terms when the Board's ruling was issued on March 3, 1975, the carriers had also filed embargo extension applications. These applications automatically extended the valid embargoes under the Board's rules (14 C.F.R. Section 228.2(b)). But the Board's purported nullification of the original embargoes left nothing remaining to extend. Order 75-2-127 thereby effectively denied the embargo extensions, as well as the initial embargoes, and in fact required the acceptance by carriers of the questionable items.

Moreover, while the Board pretends to defer to DOT/FAA with regard to the relevant safety issue, its rulings herein implicitly determine that the embargoed materials are safe and must be accepted, regardless of the concern of the carriers and their employees. If the Board really desired to abstain from making safety determinations, then it should not have attempted to interfere as it did with the exercise by airlines and pilots of their safety responsibilities. This Court can assist the Board in achieving what it says it wants --

exclusion from the safety arena -- by granting the petitions for review and remanding the case with instructions that the Board reinstate the carriers' initial embargo notices and grant whatever extension applications are filed. In this way ALPA and the airlines will be free to exercise their independent judgment as to what hazardous cargoes can be safely carried without unlawful interference from the Board.

CONCLUSION

For the foregoing reasons, the petitions to review CAB Order 75-2-127 should be granted, the Order set aside, and the case remanded to the Board with instructions that the airlines' embargoes be reinstated and extended for so long as the carriers and their employees see fit.

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STATUTORY APPENDIX

The relevant provisions of the Federal Aviation Act of 1958, as amended (72 Stat. 731, 49 U.S.C., Sec. 1301, et seq.) are as follows:

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404 (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

JUDICIAL REVIEW OF ORDERS

Orders of Board and Secretary of Transportation subject to Review

Section 1006 (a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * *

Power of Court

(d) Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Authority to Refuse Transportation

Section 1111(a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport --

(1) any person who does not consent to a search of his person, as prescribed in section 315(a) of this Act, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given.

The relevant provisions of the tariff and embargo regulations and the Civil Aeronautics Board (14 C.F.R. Parts 221 and 228) are:

Sec. 221.38 Rules and Regulations
(a) Contents.

Except as otherwise provided in this part, the rules and regulations of each tariff shall contain:

* * *

(5) The rules and regulations relating to the transportation of explosives and other dangerous or restricted articles, showing the articles which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking, and labeling requirements have been met. Such rules and regulations shall further provide the specified packing, marking and labeling requirements. All such provisions shall be in conformity with Part 103 of the Federal Aviation Regulations (14 CFR Part 103) (as amended or revised from time to time), including those portions of the Interstate Commerce Commission Regulations for Transportation of Explosives and Other Dangerous Articles which are referred to in Part 103 of the Federal Aviation Regulations (14 CFR Part 103). The rules and regulations required by this subparagraph are required to be set forth only in those tariffs which contain rates or charges for the transportation of explosives and other dangerous or restricted articles or in a tariff issued in accordance with § 221.104.

Explosives and Other Dangerous or Restricted Articles

Sec. 221.104 The rules and regulations governing the transportation of explosives and other dangerous or restricted articles, as required by §221.38(a)(5), may be published in a separate governing tariff conforming to §§221.100 and 221.101, in lieu of including such rules or regulations in the fares tariffs or rates tariffs which they govern. Such separate governing tariff shall contain no other rules or governing provisions except that it may contain restrictions on the extent to which participating carriers will accept for transportation such explosives and other dangerous or restricted articles.

PART 228

Embargoes on Property Subpart A General Provisions

Sec. 228.1 Definitions. "Embargo" means the temporary refusal by an air carrier to accept for transportation over any route or segment thereof, or to or from any area or point of a connecting carrier, any commodity, type or class of property (other than passenger baggage) duly tendered, where, because of lack of facilities or personnel, or because it is required to give preference or precedence to other traffic entitled to priority, or because of other compelling reasons not within the control of the carrier, it is temporarily unable to perform all of the authorized transportation service requested of it. Refusal to accept property for transportation in accordance with restrictions and limitations in the tariff or the certificate of an air carrier shall not be deemed an embargo.

Sec. 228.2 Duration of Embargo. (a) Except as provided herein no embargo imposed under the provisions of this part shall extend beyond 30 days from the initial effective date of such embargo.

(b) Any air carrier who finds it necessary to continue in effect any embargo imposed under the provisions of this part for more than 30 days from the initial effective date of such embargo may file an application under Subpart B of this part for authority to extend such embargo for more than 30 days. Pending the disposition by the Board of such application, the 30-day limitation prescribed in paragraph (a) of this section shall not apply.

(c) This part shall not be construed as relieving any air carrier, during the initial 30-day embargo period prescribed herein and for any period that such embargo is automatically extended, of any duty otherwise imposed upon it to furnish authorized transportation service or to observe all requirements of the Federal Aviation Act, and the rules and regulations thereunder.

Sec. 228.3 Notice of Embargo. Whenever any certificated air carrier finds that it will be necessary for it to impose an embargo on the acceptance of any shipment, said air carrier shall give public notice thereof immediately, except when such embargo is authorized by order of the Board. When an embargo has been extended beyond the initial 30-day period pending the disposition of an application for extension pursuant to §228.2, a supplemental notice to that effect shall be given.

* * *

The relevant provisions of the hazardous materials regulations of the Federal Aviation Administration (14 C.F.R. Part 104) are:

§§ 103.1 Applicability. (a) This part prescribes rules for loading and carrying dangerous articles and magnetized materials in any civil aircraft in the United States and in civil aircraft of United States registry anywhere in air commerce.

(b) For the purposes of this part, dangerous article means the material defined and regulated in the applicable regulations of the Department of Transportation (49 CFR Parts 170-189), and includes:

(1) Explosives
(2) Flammable liquids, and solids
(3) Oxodizing materials
(4) Corrosive liquids
(5) Compressed gases
(6) Poisons
(7) Etiologic agents
(8) Radioactive materials

* * *

§ 103.3 Certification requirements. (a) No person may offer any dangerous article for shipment in an aircraft unless there is accompanying the shipment a clear and visible statement that the shipment complies with the content, quantity, packaging, marking, and labeling requirements of this part. The shipper's statement shall include a statement of whether the shipment is eligible under this part for shipment in passenger-carrying aircraft. The shipper or his authorized agent shall sign the statement manually, or by typewriter or other mechanical means.

* * *

(d) No person may accept any dangerous article for shipment in an aircraft unless --

(1) It is accompanied by the statement required by paragraph (a) of this section:

(2) The inspection required by §103.4 discloses that the packaging, marking, and labeling of the hazardous material is in compliance with this Part; and

(3) After June 30, 1975, for radioactive materials, the inspection required by §103.23(c) discloses that the radiation dose rate does not exceed any requirement set forth in §103.23(d).

§103.4 Inspection requirements. (a) No person may carry any dangerous article in an aircraft unless, prior to placing the article in the aircraft, the operator of the aircraft has inspected the outside container in which that article is packaged and has determined that --

(1) The container has no dents, holes, leakage or other indication that the integrity of the packaging has been compromised and, for radioactive materials, that the package seal has not been broken;

(2) The labeling and marking of the container complies with the requirements of this part; and

(3) The dangerous article is authorized, and is within the quantity limitations specified by this part for carriage aboard the aircraft.

* * *

§ 103.7 Passenger-carrying aircraft. No person may carry any dangerous article in a passenger-carrying aircraft except --

(a) Articles specified by 49 CFR Part 173 as exempted from the specification packaging, marking, and labeling requirements of 49 CFR Part 173, when those articles are shipped as required for the exemption; and

(b) The following articles when packaged, marked, and labeled as specifically provided in 49 CFR Parts 171 through 173 for shipment by rail express:

(1) Small arms ammunition and practice cartridge ammunition.

(2) Class C explosives, other than those permitted under subparagraph (1) of this paragraph, with a net weight of not more than 50 pounds in each outside container.

(3) Subject to §103.19(a), nonflammable compressed gases, except anhydrous ammonia, boron trifluoride, chlorine, hydrogen bromide, hydrogen cloride, nitrosyl chloride, and sulfur dioxide.

(4) X-ray film or motion picture film, with a nitrocellulose base, either exposed or unexposed.

(5) Pyroxylin plastics containing nitrocellulose, in sheets, rolls, rods, or tubes.

(6) Subject to §103.19(b), radioactive materials.

(7) Fusees (railway and highway) with a net weight of not more than 50 pounds in each outside container.

§103.9 Cargo-only aircraft. (a) No person may carry any dangerous article in a cargo-only aircraft, except those articles permitted on passenger-carrying aircraft under §103.7, and except articles that --

(1) Are specified in 49 CFR 172.5 as acceptable for shipment by rail express;

(2) Do not exceed the maximum quantity for each outside container specified in 49 CFR 172.5 for rail express and

(3) Are packaged, marked, and labeled as specified in 49 CFR Part 173 for shipment by rail express.

(b) For the purposes of this part, a cargo-only aircraft is any aircraft that is not a passenger-aircraft.

The relevant provisions of the hazardous materials regulations of the Department of Transportation (49 C.F.R. Parts 171-179) are too voluminous to reproduce or even excerpt fairly here.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Brief of the Petitioners to be hand-delivered , this date, upon Glen M. Bendixsen, Associate General Counsel for Litigation and Research, Civil Aeronautics Board, 1825 Connecticut Avenue, N. W. Washington, D. C.

Daniel M. Katz

Daniel M. Katz

April 8, 1975.